

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MICHAEL LEON MONTOYA, JR.,

No. C 10-4139 WHA (PR)

Petitioner,

**ORDER OF DISMISSAL WITHOUT
PREJUDICE**

vs.

RAUL LOPEZ, Warden,

Respondent.

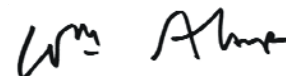
Petitioner, a California prisoner proceeding pro se, filed this petition for a writ of habeas corpus under 28 U.S.C. 2254.

Petitioner concedes that he presently has a “petition, appeal or other post-conviction proceeding” pending before the California Court of Appeal. The Ninth Circuit has held unequivocally that the habeas exhaustion requirement is not satisfied if there is a pending proceeding in state court, even if the issue the petitioner seeks to raise in federal court has been finally determined by the highest available state court. *Sherwood v. Tomkins*, 716 F.2d 632, 634 (9th Cir. 1983). This is because the pending state action might result in reversal of the conviction on some other ground, mootng the federal case. *Ibid*.

The petition is **DISMISSED** without prejudice to refiling it when no further proceedings are pending in the California state courts. *See ibid.* (if state court action is pending, claims are not exhausted).

IT IS SO ORDERED.

Dated: September 27, 2010.



WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE